

Before the
Federal Communications Commission
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

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**Comments of
Telco Communications Group, Inc.**

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SUMMARY

- When facilities-based carriers pass their universal service contributions through to local resellers in the form of increased charges for interconnection, increased wholesale rates, and other charges, the local reseller has effectively been forced to contribute to the universal service funding mechanism twice, once through its own assessment and a second time through its payment to the facilities-based carrier. This double-recovery violates the equitable and nondiscriminatory requirements of Section 254(b)(4) and the competitive neutrality principle recommended by the Joint Board.
- The Commission should clarify that a switch-based reseller that purchases an incumbent's universal service package at wholesale rates, then resells such service to eligible customers, is an eligible carrier under Section 214(e)(1) if the carrier uses its switch (*i.e.*, its own facilities) to provide any aspect of the universal service, including exchange access or billing. The Commission should also reconsider the Joint Board's rejection of TRA's argument that by combining the unbundled network elements of a facilities-based carrier, a local reseller creates its own network and thus is an eligible carrier under Section 214(e)(1).
- If local resellers are not eligible to receive universal service support from the universal service fund, the Commission should require facilities-based carriers to pass through universal service support to the local reseller that actually serves the customer, or allow the local reseller to credit against its universal service fund assessment the amount of the subsidy it would have received had it been eligible.
- The Commission should explicitly state that under the rule recommended by the Joint Board regarding disconnection of service for non-payment of toll, carriers may be prohibited from disconnecting service for non-payment of toll only where the customer failing to pay the toll service bill participates in the Lifeline program.
- The Commission should adopt the Joint Board's recommended criteria to ensure that the administrator of the universal service fund mechanism is a neutral third party.

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INTRODUCTION AND SUMMARY

Telco Communications Group, Inc. ("Telco"), by its undersigned counsel and pursuant to Public Notice, DA 96-1891 (released November 18, 1996), submits these Comments on the Recommended Decision of the Joint Board issued in the above-captioned proceeding.¹

Telco has been providing long distance services to its customers for approximately three years and is currently the ninth largest long distance carrier in the United States. Telco affiliates are authorized to provide long distance telecommunications services on an intrastate basis in every state except Alaska and Hawaii. Telco provides long distance telecommunications services through a combination of its own switches and the resold services of other carriers.

Telco is actively seeking to enter the local exchange market on a resale basis and has filed applications for authority to provide resold local exchange service in a number of states. Telco

¹*In the Matter of Federal-State Joint Board on Universal Service*, Recommended Decision of the Joint Board, CC Docket No. 96-45 (rel. Nov. 8, 1996) ("Recommended Decision").

plans to provide local service in conjunction with its provision of long distance services. As an interexchange reseller and a new entrant in the local exchange market, Telco is keenly interested in the Commission's universal service rulemaking. Telco files these comments in response to the Joint Board's Recommended Decision to urge the Commission not to adopt those recommendations that unreasonably discriminate against local resellers.

First, the Joint Board did not go far enough to ensure that local resellers are not subject to double assessments when making their contribution to the universal service fund. The Joint Board recommended that all telecommunications carriers be required to contribute to universal service support mechanisms and recommended that support be based on carriers' gross telecommunications revenues net of payments to other carriers. While this assessment mechanism takes the first step toward eliminating double-recovery from local resellers, it does not go far enough. The Commission should take the next step and adopt a rule that prohibits facilities-based carriers from recovering their universal service fund assessments by increasing rates charged to local resellers.

Second, the Joint Board's interpretation of what constitutes an "eligible carrier" is incorrect, discriminates against local resellers and new entrants to the local exchange market, and violates the pro-competitive goals of the 1996 Act² and the principle of competitive neutrality. The Commission should adopt a competitively-neutral definition of an eligible carrier that does not exclude local resellers from receiving universal service support.

²Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

Finally, the Commission should adopt the Joint Board's recommended criteria to ensure that the administrator of the universal service fund is neutral and does not favor any one class of telecommunications carriers over another. By taking these steps, the Commission will advance both the pro-competitive goals of the 1996 Act and the universal service goal of ensuring access to telecommunications services for all customers in all regions of the nation.

I. BASING UNIVERSAL SERVICE CONTRIBUTIONS ON GROSS TELECOMMUNICATIONS REVENUES NET OF PAYMENTS TO OTHER CARRIERS OVER-ASSESSSES LOCAL RESELLERS.

Section 254(d) of the Communications Act, as amended, states that "every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis" to the preservation and advancement of universal service, and permits the Commission to exempt carriers from contribution only if their contribution would be *de minimis*. The Joint Board recommended that contributions be based on a carrier's gross telecommunications revenues net of payments to other carriers, saying:

[w]e favor this methodology for several reasons. First, basing contributions on gross revenues net of payments to other carriers eliminates the "double payment" problem discussed by commenters.³

Telco does not seek to evade its obligation to help support any universal service mechanism created by this Commission consistent with the terms of the statute. However, Dial & Save

³Recommended Decision at ¶ 807.

respectfully suggests that the mechanism recommended by the Joint Board is not consistent with the statute and addresses only a part of the "double payment" problem.

As the Telecommunications Resellers Association ("TRA") has argued,

[f]acilities-based network providers will likely incorporate interstate support contributions into their charges and pass them through to resale carriers. If interstate support contributions are collected directly from resale carriers and resale carriers can incorporate such contributions into their rates, they will likewise pass these amounts through to their customers, along with the contributions passed through to them by their network providers. ... The more likely scenario, however, is that market forces would prevent resale carriers from incorporating the multiple contributions into their charges and as a result, their net revenues would be reduced.⁴

While Telco does not wish to have its net revenues so reduced, there is another important point to this story. If facilities-based carriers pass their universal service contributions through to local resellers, the local reseller has effectively been forced to contribute to the universal service funding mechanism twice, once through its own assessment and a second time through its payment to the facilities-based carrier.

This double-recovery violates the equitable and nondiscriminatory requirements of Section 254(d) and the competitive neutrality principle recommended by the Joint Board.⁵ Because the local reseller necessarily competes with the facilities-based carrier for customers, it would obviously not be competitively neutral if incumbent local telephone companies simply inflated the interconnection charges, access charges, or wholesale rates paid by their competitors to recoup the incumbent's

⁴*In the Matter of Federal-State Joint Board on Universal Service*, Comments of the Telecommunications Resellers Association, 7 (April 12, 1996) ("TRA Comments").

⁵The competitive neutrality principle is discussed *infra* in section II.B.

universal service assessment. In order to enforce the equitable and nondiscriminatory requirement of Section 254(d) and the Joint Board's principle of competitive neutrality, the Commission should prohibit carriers from recovering universal service assessments from access charges, wholesale charges, interconnection charges, residual interconnection charges or charges for any service sold exclusively to telecommunications resellers. In other words, a carrier should look to services sold to end-users, and not to services sold to competitors, for recovery of its universal service assessment.

II. LOCAL RESELLERS MUST BE ELIGIBLE FOR UNIVERSAL SERVICE SUBSIDIES

The Joint Board's interpretation of what constitutes an "eligible carrier" is incorrect, discriminates against resellers, and violates the pro-competitive goals of the 1996 Act and the principle of competitive neutrality. The Commission should adopt a competitively-neutral definition of an eligible carrier and should not exclude local resellers from participating in universal service support.

A. The Terms of Section 214 Do Not Expressly Exclude Local Resellers from the Class of Carriers Eligible to Receive Universal Service Support

The Joint Board recommended that "the Commission reject arguments to disqualify certain classes of carriers from eligibility" and that "any telecommunications carrier that meets the eligibility criteria of section 214(e)(1) shall be eligible to receive universal service support."⁶ The Joint Board then found that the eligibility criteria of Section 214(e)(1) preclude carriers offering universal service

⁶Recommended Decision at ¶ 158.

solely through reselling another carrier's universal service package from becoming eligible for universal service support.⁷

Section 214(e)(1) states:

A common carrier designated as an eligible telecommunications carrier under paragraph (2) or (3) shall be eligible to receive universal service support in accordance with section 254 and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefore using media of general distribution.

Telco respectfully suggests that the Joint Board's exclusion of resellers from the class of eligible carriers is overly broad and is not warranted by the express terms of the statute. The Commission should therefore clarify that a switch-based reseller that purchases an incumbent's universal service package at wholesale rates, then resells such service to eligible customers, is an eligible carrier under Section 214(e)(1) if the carrier uses its switch (*i.e.*, its own facilities) to provide any aspect of the universal service, including exchange access or billing.

The Commission should also reconsider the Joint Board's rejection of TRA's argument that by combining the unbundled network elements of a facilities-based carrier, a local reseller creates its own network that is no less viable than the network of the facilities-based carrier.⁸ Telco notes

⁷Recommended Decision at ¶ 161.

⁸TRA Comments at 9.

that under Section 251(c)(2), incumbent local exchange carriers ("LECs") have the "duty to provide, for the **facilities and equipment of any requesting telecommunications carrier**, interconnection with the local exchange carrier's network." The Commission should interpret the term "facilities" consistently for purposes of Sections 251 and 214(e)(1) and find that where local resellers provide universal service through interconnection arrangements with incumbent LECs (including, but not limited to, use of network elements), local resellers are providing such service through a combination of their own facilities and the resold service of another carrier and are thus eligible carriers under Section 214(e)(1).

B. Excluding Local Resellers from the Class of Eligible Carriers Violates the Joint Board's Principle of Competitive Neutrality

Section 254(b) sets forth six principles upon which the Joint Board and the Commission are required to base policies for the preservation and advancement of universal service. Section 254(b)(7) allows the Joint Board and the Commission to designate additional principles that are "necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with [the] Act." The Joint Board uses this authority to recommend that the Commission adopt a seventh principle, competitive neutrality. The Joint Board states:

[w]e further believe that the principle of competitive neutrality should be applied to each and every recipient and contributor to the universal service support mechanisms, regardless of size, status or geographic location. We find that the competitively neutral collection and distribution of funds and determination of eligibility in the universal service support mechanism is consistent with congressional intent 'to provide for a pro-competitive, deregulatory national policy framework.'⁹

⁹Recommended Decision at ¶ 23.

Telco agrees with the Joint Board that this seventh principle should guide the Commission as it develops universal service policies and mechanisms. Telco respectfully submits that any rule excluding local resellers from fully participating in the new universal service fund violates the principle of competitively neutrality.

As providers of interstate telecommunications services, resellers will be assessed, under the Joint Board's recommended assessment policy, a portion of their gross revenues less payments to other telecommunications carriers.¹⁰ As providers of local service, resellers will also incur costs if they choose to provide universal service to low income and high cost customers. Denying recovery of such costs incurred by local resellers and granting recovery of such costs incurred by all other local providers of universal service will establish an uneven playing field and act as a barrier to entry in the universal service market. Faced with the prospect of not being able to recover additional costs, and competing with carriers that receive universal service subsidies to recover their own higher costs, local resellers will be either precluded from entering the universal service market (for example, by not marketing to low income customers) or forced to absorb their losses in order to provide universal service to their customers. Denying universal service support to local resellers thus will reduce customers' choices and delay the benefits of competition to the intended beneficiaries of the universal service program.

The pro-competitive goals of the 1996 Act will not be met by policies that discourage new entrants from competing with incumbent LECs. Nor will the universal service principles in Section

¹⁰Recommended Decision at ¶¶ 777-778.

254(b) be advanced by limiting the class of carriers eligible to receive universal service subsidies. For these reasons, the Commission must reconsider the competitive impact of excluding local resellers from the class of eligible carriers when interpreting the eligibility criteria of Section 214(e)(1).

C. If the Commission Determines That Section 214 Excludes Resellers from the Class of Eligible Carriers, the Commission Should Forbear From Enforcing the Exclusion

Although Telco believes that Section 214(e)(1) can be interpreted to include local resellers within the class of eligible carriers, if the Commission finds that, as a matter of law, Section 214(e)(1) excludes local resellers, it should forbear from enforcing the exclusion. Enforcement of the exclusion is not necessary to ensure that the charges, practices, classifications, or regulations associated with the provision of universal service are just and reasonable and not discriminatory. In fact, as demonstrated above, enforcing the exclusion will discriminate against local resellers, forcing them to absorb their losses, charge higher rates or stop providing universal service altogether.

Neither is enforcement of the exclusion necessary for the protection of consumers. So long as consumers receive the services supported by the universal service fund, it should make no difference whether the service provider is a local reseller or another carrier. Finally, forbearance from enforcement of the exclusion is consistent with the public interest because it will promote competition in the market for universal services which will lower prices, increase incentives for innovation, and increase consumer choice. For these reasons, the Commission should exercise its

authority under Section 10(a) and forbear from enforcing the exclusion of local resellers from the class of carriers eligible to receive universal service support.

D. If the Commission Retains a Facilities Restriction, Facilities-Based Providers Must Pass Through Any Universal Subsidies They Receive to Local Resellers

If local resellers are not eligible to receive universal service support from the universal service fund, the Commission should require facilities-based carriers to pass through to the reseller any universal service support the facilities-based carrier receives for providing the underlying universal service sold by the local reseller to low income and high cost customers. In other words, the facilities-based carrier must not be allowed to recover a windfall from the universal service fund when it does not in actuality provide service to the end user. By providing resold local services, the local reseller steps into the shoes of the LEC and assumes the risks associated with providing the services supported by the federal universal service mechanism. The local reseller is the customer of the facilities-based provider and pays that provider to utilize the service. At the same time, the local reseller guarantees the provider a return on its investment in those facilities. The Commission should not allow the facilities-based provider to recover the costs of providing the underlying universal service from the universal service fund when those same costs are recovered from the local reseller purchasing the service. If the facilities-based carrier is able to subsidize its costs of providing universal service to local resellers, that subsidy must be reflected in the amount the facilities-based provider charges the local reseller.

In the alternative, resellers providing universal service should receive credits that reduce their otherwise applicable universal service contribution. If a reseller provides universal service to a

customer without universal service support to offset its costs, that carrier should be allowed to offset its universal service fund assessment by the amount of support the carrier would have received had it been eligible. If local resellers are excluded from the class of eligible carriers and facilities-based providers do not pass through universal service subsidies to the local reseller that actually serves the customer, then providing credits to resellers is the only way to ensure that the federal universal service mechanism is competitively neutral.

III. THE COMMISSION SHOULD STRICTLY LIMIT TO LIFELINE PARTICIPATING CUSTOMERS THE JOINT BOARD'S RECOMMENDED RULE ON DISCONNECTION OF SERVICE FOR NON-PAYMENT OF TOLL

The Joint Board has recommended that carriers receiving universal service support for providing Lifeline services should be prohibited from disconnecting such service for non-payment of toll charges because such a rule "will create an incentive for carriers to offer low-income consumers toll-limitation services to manage their toll expenditures."¹¹ The Joint Board cites "studies demonstrating that a primary reason subscribers lose access to telecommunications services is failure to pay long distance bills."¹² Based on these studies, the Joint Board finds that toll-limitation services are "essential to education, public health or public safety" and "consistent with

¹¹Recommended Decision at ¶ 387.

¹²Recommended Decision at ¶ 384.

the public interest, convenience, and necessity” because they “maximize the opportunity of customers to remain on the telecommunications network.”¹³

Without agreeing that a customer’s failure to pay long distance bills is the, or even a, primary reason subscribers lose access to telecommunications services, Telco agrees that to the extent the no-disconnection-for-non-payment-of-toll rule encourages carriers to offer such toll limitation services to low-income customers, the rule may be valuable. Telco notes, however, that the Joint Board itself strictly limited application of the rule to Lifeline customers. If the Commission determines that such a rule does further universal service goals of providing access to the telecommunications network to low income subscribers, Telco urges the Commission to make very clear that the rule is limited to Lifeline-participating customers only. In other words, carriers receiving universal service support for providing toll limitation services may **not** be prohibited from disconnecting service for non-payment of toll by a customer that does not participate in the Lifeline program.

IV. THE COMMISSION MUST ENSURE THAT THE FUND ADMINISTRATOR IS NEUTRAL

The Joint Board specifically rejected suggestions that the National Exchange Carrier Association (“NECA”) and/or state regulators act as the administrator of the universal service fund.¹⁴

¹³Recommended Decision at ¶ 384.

¹⁴Recommended Decision at ¶¶ 830, 832.

Instead, the Joint Board recommended that the Commission designate a neutral, third party administrator that would:

- (1) be neutral and impartial;
- (2) not advocate specific positions to the Commission in non-administration-related proceedings;
- (3) not be aligned or associated with any particular industry segment;
- (4) not have a direct financial interest in the support mechanisms established by the Commission; and
- (5) have the ability to process large amounts of data and bill large numbers of carriers.¹⁵

Telco strongly urges the Commission to adopt the Joint Board's criteria for a neutral administrator. The pro-competitive goals of the 1996 Act and the competitive neutrality principle advocated by the Joint Board cannot be met by an administrator that is inherently biased toward any one group of telecommunications providers. Telco agrees that even an apparent conflict of interest, absent any direct evidence of bias, must be avoided. The Commission should apply the Joint Board's recommended criteria and utilize a competitive bidding process to select a neutral administrator that will administer the universal service fund in a pro-competitive, equitable, and nondiscriminatory manner for the benefit of all competitors and all consumers.

V. CONCLUSION

The Commission should adopt universal service policies and mechanisms that further both the pro-competitive goals of the 1996 Act and the goal of ensuring access to telecommunications

¹⁵Recommended Decision at ¶ 830.

services for all consumers in all regions of the nation. Making local resellers eligible to receive universal service support will further these goals and increase the choices available to low income consumers and consumers in high cost areas.

Respectfully submitted,



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December 19, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 1996, the foregoing Comments of Excel Telecommunications, Inc. were served via hand delivery* or first-class mail, postage prepaid, on the following:

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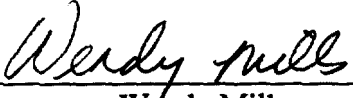
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